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IN THE

Supreme Court of the United States

October Term, 1961

No. 188

W. J. DILLNER TRANSFER COMPANY, et al.,
Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Appellees.

On Appeal From the United States District Court for the Western District of Pennsylvania

MOTION TO AFFIRM

DONALD A. BRINKWORTH,
CARL HELMETAG, JR.,
Counsel for The Pennsylvania Railroad Company, Intervening Appellee.

1138 Transportation Center,
Six Penn Center Plaza,
Philadelphia 4, Pennsylvania.

July 27, 1961.

International, 711 So. 50th St., Phila. 43, Pa.

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IN THE

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OCTOBER TERM, 1961

No.

W. J. DILLNER TRANSFER COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, The Pennsylvania Railroad Company, an intervening appellee, moves that the judgment of the District Court be affirmed on the ground that the question raised by appellants are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This is a direct appeal from a judgment of a statutory three-judge District Court, entered April 26, 1961, pursuant to 49 U. S. C. § 17(9) and 28 U. S. C. §§ 2321-25, refusing to enjoin, annul or set aside orders of the Interstate Commerce

Commission entered April 10 and September 23, 1959, and January 13, August 1 and 16, 1960, implementing the findings of its report in *W. J. Dillner Transfer Company—Investigation of Operations*, 79 M. C. C. 335 (1959). The opinion of the Court below is reported in *W. J. Dillner Transfer Company v. I. C. C.*, 193 F. Supp. 823 (W. D. Pa. 1961).

The proceeding from which the instant appeal arises was an investigation by the Commission under Section 204(c) of the Interstate Commerce Act, 49 U. S. C. 304(c), to determine whether or not the W. J. Dillner Transfer Company was transporting commodities which were not within the scope of its interstate certificates of public convenience and necessity. After four days of hearings, briefs, an Examiner's recommended report, exceptions and oral argument, the Commission concluded that Dillner was not authorized to transport steel channels, plates, sheets, bars, rods, coils, rolling mill rolls and firebrick in bundles or packages, or fastened on skids. Thereafter a cease and desist order was issued against Dillner. After several petitions for reconsideration were denied by the Commission, Dillner filed a complaint in the United States District Court for the Western District of Pennsylvania asking that the order of the Commission be enjoined, annulled and set aside. The District Court concluded that the Commission's order was supported by substantial evidence and therefore on April 26, 1961 directed that the complaint be dismissed.

By direct appeal, pursuant to 28 U. S. C., § 1253, Dillner and the other appellant motor carriers ask this Court to note probable jurisdiction and assign the matter for oral argument. In this motion The Pennsylvania Railroad Company takes the position that the questions presented by the appeal are unsubstantial within the meaning of paragraph 1(c) of Rule 16, and that, therefore, further argument is not needed. Since the opinion and order of the court below are fully consistent with the law, the Railroad moves this Court to affirm them upon the pleadings.

ARGUMENT IN SUPPORT OF MOTION

Dillner, and the other appellant motor carriers, are known as heavy haulers. This group of carriers is generally engaged in the transportation of large machinery and other heavy commodities which, because of their size and weight, cannot be transported upon the trailers used by motor carriers handling ordinary shipments. To accommodate this large and heavy freight specially designed trailers must be used in most instances and special devices such as cranes must be used to load and unload the freight. This specially designed equipment cannot economically be used for ordinary freight with the result that heavy hauling is a specialized field.

To the group of specialists engaged in heavy hauling operations the Commission has issued certificates which do not specifically name the exact items authorized to be transported. For such certificates to do so would be impractical, if not impossible, because heavy machinery and like commodities include an extremely wide range of individual items. The certificates which the Commission has issued describe in somewhat broad terms the type of transportation the specialists are authorized to perform. Thus, the ordinary heavy hauling certificate, which is the type that Dillner holds, authorizes the transportation of ". . . heavy machinery and such commodities which because of their weight and size require special equipment".

The purpose of the investigation before the Commission was to determine whether the Dillner certificate authorizes the transportation of such items as steel plates, sheets, bars, rods, pipe or firebrick—which are normally handled by motor carriers other than the heavy haulers and which, if individually offered, can be loaded and unloaded without special equipment—when offered in bundles, or other consolidations, requiring cranes for loading and unloading. Stated a little differently, the issue before the Commission was whether commodities which if shipped separately would clearly be outside the scope of the heavy

haulers' certificates become freight authorized to them when they are bundled or otherwise assembled into heavy loads which require some type of special equipment to load and unload them.

The Commission, after carefully analyzing the considerable testimony before it and after reviewing interpretations made by it of heavy hauling certificates in earlier instances, concluded that it is the nature of the individual commodity which determines whether it is within the category of freight authorized to the heavy haulers. Thus, individual items, for example, steel channels, which can be transported without the use of special equipment and can be loaded without cranes, may not lawfully be transported by the heavy haulers merely because when presented in bundles some type of special equipment is needed to load and unload them.

The test applied by the Commission did not originate and was not developed for the first time in this case. It is a test which has been utilized and applied by the Commission in many certificate interpretation cases. See *Black—Investigation of Operations*, 64 M. C. C. 443, 448 (1955); *H. J. Jeffries Truck Line, Inc., Extension—Nebraska*, 68 M. C. C. 191, 194 (1956); *Continental Tennessee Lines, Inc. v. Ligon*, 78 M. C. C. 319, 325 (1958); *Tarantola Extension—Radioactive Materials*, 81 M. C. C. 515, 518 (1959); *Ploof Transfer Co., Inc., Extension—Aluminum Pipe*, 82 M. C. C. 325, 330 (1960); and *Aero Trucking, Inc., Extension—Pipe*, 83 M. C. C. 97, 101 (1960).

Six years before the instant proceeding, in *Johnson Common Carrier Application*, 61 M. C. C. 783 (1953), when interpreting a certificate like Dillner's, the Commission in finding that the transportation of roller bearings was not authorized by a heavy-hauling certificate had said:

> "Although, as previously indicated, commodity descriptions used by us in certificates and permits have varied somewhat in the words actually used, we have not, so far as we are aware, ever authorized a grant of

> authority to transport 'shipments' as distinguished from 'commodities', and it is clear that there was no intention to depart from this practice herein. We threfore conclude that the individual commodity or commodities to be transported, as contrasted to a shipment in the aggregate, must be within the scope of the authority granted. Compare *Bareford Contract Carrier Application*, 32 M. C. C. 611, 614. Thus the test is whether the commodity or commodities severally are such as to require the use of special equipment for loading and unloading or over-the-road transportation, or both." (61 M. C. C. 791, 792.)

Because of the interpretation of its certificate, some of the transportation being performed by Dillner was found to be unlawful and therefore the Commission ordered the carrier to cease and desist from continuing it.

When asked to set aside the Commission' action, the court below held that the Commission's interpretation of the certificate must prevail unless it could be shown to be arbitrary, an abuse of discretion, or without evidence to support it. 193 F. Supp. 826, 828. As authority for this view it cited *Malone Freight Lines v. United States*, 107 F. Supp. 946, 949 (N. D. Ala. 1952), in which a three judge court stated the law in precisely the same way. *Malone* was affirmed by this Court upon motion.[1] Reliance was also placed upon the recent statements of this Court in *Service Transfer Co. v. Virginia*, 359 U. S. 171, 177. Applying this rule of law the court below concluded that the interpretation of the Commission was carefully made and was neither arbitrary nor without support in the evidence. The complaint was therefore dismissed.

The Jurisdictional Statement of the appellant does not challenge the rule of law utilized by the court below, nor does it specify any respects in which the rule of law was improperly applied to the circumstances. Rather it asks

1. 344 U. S. 925.

this Court to consider *de novo* matters which were before the Commission for initial determination. This Section 10 of the Administrative Procedure Act[2] makes clear it is neither the function of this Court nor of the court below. It would therefore seem apparent that the questions are unsubstantial and further argument would serve no purpose. While it is believed that this is a sufficient basis for granting this motion to affirm, the Railroad submits the following comments with respect to each of the questions presented in the Jurisdictional Statement as a further basis for granting the motion.

Question (a) is frivolous. Dillner is a "heavy hauler and rigger", and has been known as such throughout the industry for many years. The Commission has specific statutory authority to classify motor carriers by the services they perform under Section 204(b) of the Interstate Commerce Act, 49 U. S. C. § 304(b).

Question (b) is moot. Appellants never requested the Commission to enter an early order. Furthermore, Dillner continued to transport all of the commodities involved without restriction throughout the entire period the proceeding was pending before the Commission.

Question (c) is immaterial. The proceeding arose out of petition filed by competing motor carriers and by Dillner. The issue is whether or not there was substantial evidence of record before the Commission regardless of which of the parties presented it.

Question (d) is not entitled to consideration for the reason that it is based upon a false premise. The court below considered all of the certificated authority held by Dillner relating to the transportation of iron and steel articles and firebrick between points in Ohio, Pennsylvania and West Virginia.

Question (e) is also based upon a false premise. The court below stated a fundamental rule of appellate review,

2. 5 U. S. C. § 1009.

namely that the burden was upon Dillner, the Complainant, to show that the order and report of the Commission was clearly erroneous, capricious, arbitrary or not supported by substantial evidence.

Question (f) was reviewed by the court below. The Court found that there was no substantial difference between the recommended report of the Examiner and the report of the Commission. Furthermore, the Commission is not bound by the recommended report of its Examiner. See *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 496.

Question (g) is irrelevant. This statement by the court below was merely an observation of a possible result if the Commission's test were not applied in interpreting heavy hauling certificates.

Question (h) is irrelevant and immaterial. The court below merely found that the "grandfather authority" was not involved in the interpretation of Dillner's certificate and that at any rate Dillner had offered no evidence of its "grandfather operation" in the hearings before the Commission.

Question (k) is frivolous. Every motor carrier, and every shipper using a certificated motor carrier, has the obligation of determining whether the carrier is authorized to perform a requested transportation service prior to its being undertaken. No greater burden is required by the lower court's opinion in so far as heavy haulers are concerned.

Question (j) is not applicable to the case. There was no such finding or order.

Question (k). Appellants have no basis for raising this issue. The court below did limit itself to a review to determine whether the order of the Commission was erroneous, capricious, arbitrary, or supported by substantial evidence. The only exceptions were where the Court found it necessary to answer arguments or contentions advanced by appellants.

THE RELIEF REQUESTED

It is most respectfully submitted that neither the issue actually involved, nor the matters referred to by appellants are of such substance or of such importance as to require further argument. The judgment of the District Court should therefore be affirmed.

Respectfully submitted,

DONALD A. BRINKWORTH,
CARL HELMETAG, JR.,
Counsel for The Pennsylvania Railroad Company, Intervening Appellee.

1138 Transportation Center,
Six Penn Center Plaza,
Philadelphia 4, Pa.

July 27, 1961.

Proof of Service

I, CARL HELMETAG, JR., one of the attorneys for The Pennsylvania Railroad Company, an intervening Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of July, 1961, I served copies of the foregoing Motion to Affirm to the Supreme Court of the United States on the several parties as follows: (1) on the United States by mailing copies thereof in a duly addressed envelope, with postage prepaid, to the Honorable Robert Kennedy, Attorney General of the United States, Department of Justice, Washington 25, D. C.; (2) on the United States by mailing copies in a duly addressed envelope, with postage prepaid, to the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; (3) on the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert Ginnane, Esq., its Chief Counsel at the Offices of the Commission, Washington 25, D. C.; (4) on the other parties by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows:

Ernie Adamson, Esq.,
2748 W. Liberty Avenue,
Pittsburgh 16, Pa.

Herbert Baker, Esq.,
50 W. Broad Street,
Columbus 15, Ohio.

Rice, Carpenter & Carraway, Esqs.,
1618 Perpetual Building,
Washington 4, D. C.

DeLisi & Wick, Esqs.,
1515 Park Building,
Pittsburgh 22, Pa.

.....

CARL HELMETAG, JR.,
Attorney for The Pennsylvania Railroad Company,
1138 Transportation Center,
Six Penn Center Plaza,
Philadelphia 4, Pa.